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No. 09-1455

Supreme Court, U.S.
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In The

Supreme Court of the United States

LAURIE ANCONA REINE,

Petitioner,

v.

HONEYWELL INTERNATIONAL, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, in a Title VII hostile work environment case, the Plaintiff is required to prove that male employees were treated differently as an element of the claim?

II. Whether, in a Title VII hostile work environment case, harassment can be found to be based on sex when the harassment is directed to both men and women but the harassing conduct is more offensive to women than to men?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner in this case is Laurie Ancona Reine, represented by J. Arthur Smith, III, SMITH LAW FIRM, 830 North Street, Baton Rouge, Louisiana 70802.

The Respondent in this case is Honeywell International, Inc., represented by Thomas H. Kiggans, PHELPS DUNBAR, LLP, II City Plaza, Suite 1100, 400 Convention Street, Baton Rouge, Louisiana 70802.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Laurie Ancona Reine, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is set forth at App. 1 of the Appendix. The February 25, 2010 order of the United States Court of Appeals for the Fifth Circuit denying rehearing en banc and rehearing is set forth at App. 13 of the Appendix. The district judge's transcribed oral reasons for judgment granting Respondent's Motion for Summary Judgment is set forth at App. 8 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 2010. The court denied a timely Petition for rehearing and rehearing en banc on February 25, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant provisions of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2002e-2(a) and 42 U.S.C. § 2002p-2(a), are reproduced in the appendix to this Petition.

STATEMENT OF THE CASE

This is an action brought pursuant to Title VII, 42 U.S.C. § 2000e, *et seq.*, seeking declaratory and injunctive relief and damages, based on allegations of gender-based harassment and retaliation.

This Petition involves the conflicting interpretations of this Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (hereinafter sometimes referred to as "*Oncale*") by the circuit courts of appeals.

Laurie Reine, Petitioner, is employed as an operator at the Respondent's chemical plant in Geismar, Louisiana. She has been so employed at this plant for approximately fifteen (15) years. Petitioner alleges that beginning in June 2000, a Honeywell supervisor, John Gautreau, subjected her and other female coworkers to an outrageous pattern of gender-based harassment purposefully inflicted on them by Gautreau because he was opposed to women working as operators at the plant. Petitioner further alleges that she was assigned to the "D" shift under the immediate supervision of John Gautreau in July of

2002. She alleges that she was harassed by Gautreau for a five (5) year period, and that the harassment was particularly severe for the three (3) years she was assigned to the "D" shift.

Leroy George, a retired Honeywell operator, submitted a declaration in which he testified: "I was present on several occasions when Johnny Gautreau expressed his opinion that women should not be operators at this facility." According to Leroy George's declaration, Gautreau also stated:

- "This is no job for women;"
- "Women don't need to be out here;"
- "Women are taking the jobs from men who have wives and families to take care of."

According to Leroy George's declaration, John Gautreau's attitude never changed the entire time that George worked for Honeywell through July 1, 2006.

In *Carter v. Chrysler Corporation*, 173 F.3d 693 (8th Cir. 1999) the Eighth Circuit held:

> All instances of harassment need not be stated with signs of overt discrimination[1] to be relevant under Title VII, if they are part

[1] There is no legal requirement that hostile acts be overtly sex or gender-specific in content, whether marked by language, by sex, by gender stereotypes, or by sexual overtones. *EEOC v. National Education Assoc., Alaska*, 422 F.3d 840, 844 (9th Cir. 2005).

> of a course of action which is ***tied to evidence of discriminatory animus.*** *(Emphasis supplied).*

In *Butler v. Ysleta Independent School District*, 161 F.3d 263 (5th Cir. 1998), the Court stated:

> As Schultz has persuasively argued, the "core component of hostile work environment] harassment is conduct designed to undermine a woman's confidence." Schultz, *supra*,[2] at 1769 (see also *Id.* at 1762) "much of the behavior that creates a hostile work environment is conduct that has the purpose or effect to undermine the perceived or actual confidence of women (and some men) to threaten the idealized masculinity of those who do the work."); cf. *Franke*, (citations omitted) conduct constitutes sexual harassment, it must be "a practice grounded and undertaken in the service of hetero-patriarchal norms" . . . a plaintiff, however, must show that implicit or explicit in the sexual content, is the message that the plaintiff is incompetent because of her sex, and the defense cannot draw such a connection here. (*Id.* at 267).

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[2] In *Schultz*, "Reconceptualizing Sexual Harassment," 107 Yale L.J. 1683, 1755 (1988), Professor Shultz notes that "the use of sex-specific and derogatory terms can indicate that there is a general hostility towards the presence of women in the workplace."

In *Donaldson v. CDB, Inc.*, 335 Fed. Appx. 494 (5th Cir. 2009) the Court held:

> Moreover, although calling her "stupid" and ignorant about the requirements of the job, and repeatedly driving past, peering at, and telephoning the store where she received assistant-manager training were, of course, not sexually charged actions, when viewed in the totality of the circumstances, they lend support to the existence of a genuine issue of material fact on whether Donaldson was a victim of an abusive working environment. (*Id.* at 502).

In this case, Laurie Reine submitted evidence that the jury could reasonably construe as establishing John Gautreau's message that he intended to get rid of women operators because he felt that they are incompetent. He stated that:

- they were "stupid";
- their "priorities were not straight";
- "Laurie is in oblivion";
- "Laurie is emotional";
- "Laurie is too slow";
- "you (Laurie) must not be able to handle the board by telling people what to do";
- "you're always doing things on your own";
- "you're not a team player";
- "you ask the stupidest G-D questions";
- "you're just too comfortable".

The context of Gautreau's words shows that they were stated to Laurie Reine on a daily basis, while Gautreau was screaming and yelling at her in a condescending manner.

There is also evidence that offensive physical acts by Gautreau toward Laurie Reine included trying to get Laurie Reine into his truck against her will, and, on another occasion, blocking her path in a doorway.[3] Laurie Reine also testified that Gautreau stared at her in a menacing way.

The summary judgment evidence also shows that Gautreau made numerous references to Laurie Reine and other female employees as "bitches." Gautreau referred to Cindy Green as a "big, fat, nasty gross bitch," to Sandy Hughes as a "dumb bitch," and to Barbara Gilmore as a "big, lazy, fat ass". In *Bowen v. Missouri Department of Social Services*, 311 F.3d 878 (8th Cir. 2002), the supervisor made two "white bitch" comments. The court held that: "Because these epithets carry clear racial overtones, their use permitted the inference that racial animus motivated not only the overtly discriminatory conduct, but all other conduct toward Bowen." See also *EEOC v PVNF, LLC*, 487 F.3d 790, 799-800 (10th Cir. 2007); *Windsor*

[3] In *Gregory v. Daly*, 243 F.3d 687 (2nd Cir. 2001); and *Smith v. Union National Bank*, 202 F.3d 234 (4th Cir. 2000), the courts held that evidence that a supervisor intimidated a plaintiff by standing uncomfortably close to her even though she asked him to move away is probative of a hostile work environment.

v. Hinckley Dodge, Inc., 79 F.3d 996 (10th Cir. 1996); *Jenson v. Evelath Taconite Company*, 824 F. Supp. 847, 883 (D. Minn. 1993); *Burns v. McGregor Electronic Indus., Inc.*, 989 F.2d 959 (8th Cir. 1993); *Huddleson v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 902 (11th Cir. 1988); *Yvonne Tamayo*, "Rhymes with Rich: Power, Law and the B-tch," 21 St. Thomas L. Rev. 281, 290 (2009) "The prevalent use of the term 'B-tch' remains a valuable linguistic tool for devaluing and harassing women solely because of their gender."

The summary judgment evidence in this case also shows that John Gautreau made derogatory comments about Laurie Reine's appearance not being in conformity with stereotypical suppositions about how women are expected to look and dress. Gautreau effectively insulted Laurie Reine for not being feminine enough. His statements included the following comments which were made to or about Laurie Reine:

- "You need to do something about your 'mustache';"
- Laurie Reine's hair was "too wild;"
- He stated that "Laurie Reine would have sex with a gorilla."

He also condoned co-worker conversations in which Laurie Reine was called a "witch" and laughed about these comments.

The evidence also shows several tangible employment actions which were taken by *John Gautreau*

himself against Laurie Reine, including passing her over for three (3) promotions, passing her over for overtime assignments, and passing her over for a bonus. Jim Rogers, another Honeywell supervisor, testified that Laurie Reine was not promoted to a board operator position due to the fact that Gautreau had denied her training while she was assigned to Gautreau's shift.

The summary judgment evidence shows that Gautreau's targets of harassment were primarily female operators but he also targeted African American male operators. The Petitioner respectfully submits that it is anomalous and inconsistent with 42 U.S.C. § 2000e-2(m) to relieve Honeywell of liability for its supervisor's harassment of female operators because Gautreau also harassed African American male operators and, in so doing, may have violated 42 U.S.C. § 2000e-(2)(a)(*l*) on the basis of race harassment. *McGinest v. GTE Service Corporation*, 360 F.3d 1103 (9th Cir. 2004) "Delone's use of racially charged words to goad black and white employees makes his conduct more outrageous, not less so. . . ." (*Id.* at 1118).

On December 18, 2008, the District Court, the Honorable Ralph E. Tyson presiding, granted the Respondents' Motion for Summary Judgment and dismissed the Petitioner's claims in their entirety. The Court held that Gautreau's comments could not be characterized as gender-based. The Court went on to state that even if the "Court considers the one or more of these comments as somehow gender related,

that is not sufficient to characterize the conduct as severe or pervasive such that the work environment was hostile".

On January 21, 2010, the United States Court of Appeals for the Fifth Circuit affirmed the summary judgment. The Court of Appeals held that there is a "high standard for judging hostility" and that Ms. Reine "bore the burden to prove that Gautreau's behavior toward female employees was more severe than his treatment of males in the same position. *Oncale*, at 80. She has not done so."

The Fifth Circuit denied Petitioner's subsequent Petition for Rehearing and Rehearing en banc. This Petition followed.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals' decision in this case deepened conflicts with decisions of the Second, Fourth, and Eighth Circuits on important questions regarding burden of proof that frequently arise in Title VII hostile work environment cases. The decisions of different panels of the Seventh Circuit are in conflict, but other Seventh Circuit decisions agree with the decision of the Fifth Circuit. The Fifth Circuit decision also conflicts with this Court's decision in *Oncale v. Sundowner Offshore Services, Inc., supra*.

Granting certiorari in this case would resolve those conflicts, while also providing this Court with an opportunity to bring much needed clarity to the permissible methodologies of proving gender-based harassment where there is some harassment of both sexes.

A. This Court Should Resolve the Conflict Among the Courts of Appeals as to Whether, in a Title VII Hostile Work Environment Case, the Plaintiff Is Required to Prove that She Was Treated Differently from Similarly Situated Male Employees as an Element of the Claim.

The permissible methods under which female employees may bear their burden of proof of gender-based harassment, where the harasser has also harassed members of his same sex, is the subject of a substantial and mature circuit split which awaits resolution by this Court.

In *Hart and Lewis v. Heartland Inns of America, L.L.C.*, 591 F.3d 1033 (8th Cir. 2010), Ms. Lewis brought an action based on Title VII and state law alleging that she had lost a job which she had done well because of unlawful sex stereotyping. After successfully performing her work and receiving a new position, which had been initially approved by hotel management, a director of operations raised the subject of Ms. Lewis' appearance and described her appearance as "slightly more masculine," as "an Ellen Degeneres-type look" and "tomboyed." After being

reinterviewed for the position she held, Ms. Lewis was fired. She thereafter sued, claiming that Heartland enforced a de facto requirement that a female employee conform to gender stereotypes in order to work the shift in question. The district court granted summary judgment to the defendant, holding:

> . . . the court clarifies that the mere existence of sex stereotyping is not enough, in and of itself, to support an actionable claim under Title VII. To make out a Title VII disparate treatment claim, the plaintiff must show that the treatment to which she was subjected is such that it puts her sex at a disadvantage compared to persons of the opposite sex. A plaintiff may make a showing of discrimination by demonstrating that the basis of the adverse employment action was because of her lack of conformance with a gender stereotype, but there must also be an accompanying showing that the other sex was not so disadvantaged by similar gender stereotyping. (*Id.* at 1058).

Lewis v. Heartland Inns of America, L.L.C., 585 F. Supp. 2d 1046 (S.D. Iowa 2008). The Eighth Circuit reversed, observing that:

> Title VII prohibits an employer from "'discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of sex'." 42 USC § 2000e-2(a)(*1*) . . . Discrimination occurs when sex "was a motivating factor for any employment

> practice, even though other factors also motivated the practice." § 2000e-2(m). (*Id.* at 1037-1038).

The court went on to hold:

> The district court recognized that sex stereotyping comments may be evidence of discrimination. . . . The focus of its decision was the mistaken view that a Title VII plaintiff must produce evidence that she was treated differently than similarly situated males. Our court has explicitly rejected that premise. *Young v. Warner-Jenkinson Co.*, 152 F.3d 1018, 1022 (8th Cir. 1998). Other circuits have reached the same conclusion. See, e.g., *Back,* 365 F.3d at 121; *Bryant v. Aiken Reg'l Med. Ctrs. Inc.*, 333 F.3d 536, 545 (4th Cir. 2003) . . . The required prima facie showing is a "flexible evidentiary standard" that was "never intended to be rigid, mechanized, or ritualistic." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed 1 (2002); . . . see also *McDonnell Douglas*, 411 U.S. at 802 n. 13, 93 S.Ct. 1817. "Courts consistently emphasize[d] that the ultimate issue is the reasons for the *individual plaintiff's* treatment, not the relative treatment of different *groups* within the workplace." *Back* 365 F.3d at 121. . . . As the Supreme Court explained in *Connecticut v. Teal,* 457 U.S. 440, 453-54, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982), "[t]he principal focus of [Title VII] is the protection of the individual employee, rather than the protection of the minority group as a whole". . . . The district court's

error was in requiring Lewis to offer evidence that similarly situated men were treated differently . . . Comparative evidence is certainly not the "exclusive means by which a plaintiff may establish an inference of discrimination[,]" however. *Young*, 152 F.3d at 1022. . . . The touchstone inquiry remains whether the circumstances permit a reasonable inference of discrimination . . . The Supreme Court has stated that "the critical issue" in a sex discrimination case is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993), (Ginsburg, J., concurring). "Neither of these cases, nor any other Supreme Court precedents, compel a woman alleging sex discrimination to prove that men were not subjected to the same challenged discriminatory conduct or to show that the discrimination affects anyone other than herself." . . . *Oncale* illustrates how an employee may prove an adverse employment action because of sex without evidence that employees of the opposite sex were treated differently. Oncale was part of an 8 man ship crew. *Oncale*, 523 U.S. at 77, 118 S.Ct. 998. Oncale could not show any female crew were treated differently since there were none. Evidence that he had been sexually harassed was nevertheless sufficient to support his

> Title VII claim because the harassment was because of his sex. As the Court explained, "comparative evidence about how [an] alleged harasser treated members of both sexes" is only one "evidentiary route" to prove discrimination, but a harasser's "'sex-specific and derogatory terms'" can do the same. *Id.* at 80-81, 188 S.Ct. 998. (*Id.* at 1039-1041).

In *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107 (2nd Cir. 2004), the United States Court of Appeals for the Second Circuit held:

> Defendants are thus wrong in their contention that *Back* cannot make out a claim that survives summary judgment unless she demonstrates that the defendant treated similarly situated men differently. Back has admittedly proffered no evidence about the treatment of male administrators with young children. Although her case would be stronger had she provided or alleged the existence of such evidence, there is no requirement that such evidence be adduced. Indeed we have held that, in determining whether an employee has been discriminated against "because of *such individual's* . . . sex," the courts have consistently emphasized that the ultimate issue is the reasons for the *individual plaintiff's* treatment, not relative treatment of different *groups* within the workplace. As a result, discrimination against one employee cannot be cured, or disproven, solely by favorable, or equitable, treatment of other

> employees of the same race or sex. (*Id.* at 121).

In *Bryant v. Aiken Regional Medical Centers, Inc.*, 333 F.3d 536 (4th Cir. 2003), the United States Court of Appeals for the Fourth Circuit held that:

> On appeal, ARMC contends that Bryant did not offer evidence that she was not treated differently from a similarly situated white applicant or that the hospital ever hired a less qualified applicant, for a position Bryant sought. This argument misapprehends the requirements of Title VII: Bryant is not required as a matter of law to point to a similarly situated white comparator in order to succeed on a race discrimination claim. See *Columbia Colleton Medical Center,* 290 F.3d at 648-49 n. 4 (holding the plaintiff need not prove that she was better qualified than a successful applicant if all the circumstantial evidence suggests discrimination). We would never hold, for example, that an employer that categorically refused to hire black applicants would be insulated from judicial review because no white applicant had happened to apply for a position during the timeframe in question. . . . Bryant could help her case as an evidentiary matter by establishing that she was better qualified than the other applicant. But ARMC has not made that argument here. However helpful a showing of a white comparator may be to proving a discrimination claim, it is not a necessary element of such claim. (*Id.* at 545-546).

In *Young v. Warner-Jenkinson Company, Inc.*, 152 F.3d 1018 (8th Cir. 1998), the United States Court of Appeals for the Eighth Circuit held:

> Specifically, Warner-Jenkinson argues that because Young has produced no evidence indicating that he was treated any differently than anyone else, he has not demonstrated circumstances from which the existence of unlawful discrimination may be inferred. We disagree, in *Price v. S-B Power Tool*, 75 F.3d 362, 365 (8th Cir. 1996), cert. denied. ___ U.S. ___, 117 S.Ct. 274, 136 L.Ed.2d 197 (1996), we noted that "an inference of discrimination may be raised by evidence that a plaintiff was replaced by, or treated less favorably, than similarly situated employees were not in plaintiff's protected class." It does not follow, however that evidence of disparate treatment is the exclusive means by which a plaintiff may establish an inference of discrimination. See *Miners v. Cargill Communication, Inc.*, 113 F.3d 820, 824 n. 7 (8th Cir. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 441, 139 L.Ed.2d 376 (1997) ("Although . . . disparate treatment commonly gives rise to an inference of discrimination, it cannot be the only means of demonstrating unlawful discrimination"). In *McDonnell Douglas*, the Supreme Court recognized that the prima facia case will necessarily vary in different factual situations, 411 U.S. at 802 n. 13, 93 S.Ct. 1817. We have recognized, as well, that the proof necessary to establish a prima facia case in

> discrimination cases is "not inflexible" and "varies somewhat with the specific facts of each case." *Hindman v. Transkrit Corporation,* 145 F.3d 986, 990-991 (6th Cir. 1998). (*Id.* at 1022).

In *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996), the United States Court of Appeals for the Seventh Circuit rejected the defendant's argument that the dismissal of the plaintiff's claim for sexual harassment should be affirmed on the grounds that since the harassment was impartially directed against male and female employees, there was no discrimination on the grounds of sex. The court held:

> We do not find this class of arguments compelling, and are rather surprised to find the Department of Justice urging them. Although supported by dicta in some cases, *Id.*: *Rowinsky v. Bryant Independent School District*, 80 F.3d 1006, 1006 (5th Cir. 1996); *Rabidue v. Osceola Refining Company*, 805 F.2d 611, 620 (6th Cir. 1986); *Henson v. City of Dundee*, 682 F.2d 897, 903-04 (11th Cir. 1982), such arguments interpret sex discrimination in too literal a fashion. Sexual harassment was brought under the aegis of Title VII's sex discrimination clause because it makes the workplace difficult for women on account of their sex. There is some homosexual harassment in the work place and a little bit of sexual harassment of men by women, but these are relatively esoteric practices that do not detract seriously from the fact that sexual harassment is a source of

> substantial non-pecuniary costs to many working women. It would be exceedingly perverse if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, although its preferred targets were female. See *Steiner v. Showboat Operating Company; supra*, 25 F.3d at 1464. (*Id.* at 260).

However, other decisions from the Seventh Circuit agree with the holding and rationale of the Fifth Circuit in the case *sub judice*. In *Moranski v. General Motors Corp.*, 433 F.3d 537 (7th Cir. 2005), the Seventh Circuit held:

> Because Title VII is premised on eliminating discrimination, inappropriate conduct that is inflicted on both sexes, or that is inflicted regardless of sex, is outside the statute's ambit. . . . We do not think, however, that it is anomalous for a Title VII remedy to be precluded when both sexes are treated badly. Title VII is predicated on discrimination. Given this premise, requiring disparate treatment is consistent with the statute's purpose of preventing such treatment. . . . See also *McKenzie v. Milwaukee County*, 381 F.3d 619, 626 (7th Cir. 2004); *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 899 (7th Cir. 2003); *Guardian Indus. Corp. v. N.L.R.B.*, 49 F.3d 317, 320 (7th Cir. 1995). (*Id.* at 541).

B. Permissible Methods of Proving Gender-Based Harassment, Where There Is Some Harassment of Both Sexes, Is a Question of Recurring Importance in Title VII Litigation.

The division of authority among the circuit courts should be resolved by this Court in light of the recurring importance of this issue in the lower courts. See for example, *Brown v. Flying J., Inc.*, 266 F.3d 792 (8th Cir. 2001) "A plaintiff in this kind of case need not show, moreover, that only women were subjected to harassment, so long as she shows that women were the primary targets of such harassment." (*Id.* at 798); *Brown v. Henderson*, 257 F.3d 246 (2d Cir. 2001); "The critical issue Title VII indicates, is whether members of the one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. . . . But when we have focused on the issue, we have also held that it is discriminatory treatment of an individual that matters." (*Id.* at 253); *McGinest v. GTE Service Corp.*, 360 F.3d 1103 (9th Cir. 2004), *supra* " . . . Our case law is clear that the fact that an individual 'consistently abused men and women alike' provides no defense to an accusation of sexual harassment." (*Id.* at 1118); and *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993) (noting the divergent judicial viewpoints on this issue)).

The circuit split should also be resolved by this Court in order to provide guidance to supervisors,

Human Resources personnel, and other employees so that they can conform their conduct in the workplace to consistent and clear principles of law.

The current circuit split risks treating similarly situated female employees differently, depending on the location of their workplaces. This disparity is inconsistent with congressional intent to create a uniform national body of law prohibiting gender discrimination in employment. Only this Court can restore that intent and uniformity in the law.

C. Review Is Also Warranted Because the Evidence Shows that Honeywell Violated Title VII Because John Gautreau's Conduct Was More Offensive to Female Employees than it Was to Male Employees.

The objective severity of harassment should be judged from the perspective of a reasonable person in the Plaintiff's position. *Oncale*, 523 U.S. at 81; *Petroino v. Bell Atlantic*, 385 F.3d 210 (2nd Cir. 2004). In *Petroino, supra*, the court of appeals reversed a summary judgment in a hostile work environment case based on the Plaintiff's sex even though some of the offensive conduct was directed to men. In *Ocheltree v. Scollon Production, Inc.*, 335 F.3d 325 (4th Cir. 2003), the employer contended that the offensive conduct was not based on the Plaintiff's sex and was equally offensive to some of the men. The Court disagreed, concluding that "much of the conduct . . . was particularly offensive to women

workers and was intended to provoke (Defendant's) reaction as a woman." See also *Bennett v. Carroon and Black Corp.*, 845 F.3d 104 (5th Cir. 1988); *EEOC v. National Education Association, Alaska*, 422 F.3d 846 (9th Cir. 2005); *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798 (11th Cir. 2010).

See also *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263 (6th Cir. 2009) (in which the Sixth Circuit held at page 272 that: " . . . a harasser whose offensive conduct afflicts both men and women is not an equal opportunity curser if the conduct is more offensive to women than men.") and *Crist v. Focus Homes, Inc.*, 122 F.3d 1107 (8th Cir. 1997) (in which the court held that when both men and women employees were subjected to offensive conduct but women subjectively bore the brunt, a reasonable jury could find harassment based on sex).

Due to her psychological injury, Laurie Reine sought the advice and treatment of Dr. Cary Rostow, a licensed clinical psychologist. Dr. Rostow evaluated Ms. Reine on October 2, 2007. In his deposition, Dr. Rostow testified that at this October 2, 2007 visit, Ms. Reine:

> . . . cried nearly throughout the entire evaluation. She flushed and shook. Her voice would break. Her cognitions tended to be tangential, breaking off, going in different directions, one at a time recalling certain circumstances she felt were degrading or punishing or adverse in some way. I would have to bring her back to the topic that we

> were talking about in some chronological or reasonable organization. This is highly unusual. I have done hundreds, if not thousands of evaluations in 35 years, and I seldom see a level of discomfort this high.

Dr. Rostow diagnosed Ms. Reine with post-traumatic stress disorder (PTSD) with anxiety and depression. He testified that Laurie Reine's PTSD and depression are related to her abuse at work.

Another female Honeywell operator, Jennifer Wilson, experienced such severe harassment by Gautreau that she tendered her resignation on July 10, 2001. In the resignation letter she stated, in pertinent part:

> These are only some of the incidents that have convinced me that I will never advance or succeed in becoming a skilled operator and an asset to Honeywell. I am a decent, hard-working, and dedicated employee and the hostile environment in which I have tried to work and perform has negatively affected me both on and off the job. It seems that every time I start to feel confident about anything I am doing, Johnny makes the changes necessary to set me back.

There is no evidence that any male employees were adversely affected by Gautreau's harassment.

D. Review Is Also Warranted Because the Decision Below Is Wrong.

The Fifth Circuit decision is also wrong and inconsistent with the text and purpose of Title VII. 42 U.S.C. § 2000e-2(m) provides: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

The decision of the Fifth Circuit is also inconsistent with the remedial purpose of Title VII. In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) this Court held: "The 'phrase, terms, conditions, or privileges of employment evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment,' which includes requiring people to work in a discriminatory hostile work place." (*Id.* at 21).

The decision of the Fifth Circuit is also in conflict with the *Oncale* decision of this Court. In *Oncale,* this Court held at 80 that there are at least two (2) "evidentiary routes" to proving gender harassment: (1) if the "victim is harassed in such sex-specific and derogatory terms . . . as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace"; or by (2) "comparative evidence of how the alleged harasser treated members of both sexes in a mixed-sex

workplace." The decision below is erroneous as a matter of law in concluding that Reine could only meet her burden of proof by the second method identified in *Oncale*. Although the *Oncale* decision does place emphasis on the term "discrimination", that term should not be narrowly defined. *Cf. Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005).

The Petitioner, Laurie Reine, respectfully submits that she has presented genuine issues of material fact as to gender-based harassment by the first evidentiary route approved by this Court in *Oncale*. She has also presented genuine issues of material fact as to whether Gautreau's conduct was more offensive and/or harmful to her than it was to male operators, thus satisfying another evidentiary route which has been specifically approved by the Sixth, Eighth, and Ninth Circuits.

In enacting Title VII, Congress intended to afford a meaningful opportunity to challenge practices that unreasonably injure female employees. Since 1973, when this Court decided *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a Plaintiff's burden of proof has been that of a simple preponderance of the evidence. Requiring female employees to meet a heightened "high standard" greater than a simple preponderance of the evidence and prove comparative evidence of the lack of harassment of similarly situated male employees would, in a great many cases, virtually eliminate the possibility of a remedy

for sex discrimination, conduct that Congress clearly intended to prohibit.

CONCLUSION

For all the foregoing reasons, the Petitioner, Laurie Ancona Reine, respectfully concludes that her Petition for Certiorari should be granted.

Respectfully submitted,

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May 26, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-30030

LAURIE ANCONA REINE,

Plaintiff-Appellant

v.

HONEYWELL INTERNATIONAL, INC.,

Defendant-Appellee

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:06-CV-673

(Filed Jan. 21, 2010)

Before REAVLEY, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:[*]

In this Title VII case, Laurie Reine alleges sex discrimination and retaliation by her employer, Honeywell International Inc. The district court granted

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[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

summary judgment in Honeywell's favor, determining that Reine had not created any genuine issue of material fact on either claim. We AFFIRM.

Reine began working as an operator at Honeywell in 1994 at its Hydrofluoric Acid Unit in Geismar, Louisiana. In July of 2002, Reine was promoted to relief backup board operator and transferred to the "D" shift under the supervision of John Gautreau, for whom she worked until July of 2005. During that time, Reine contends that Gautreau made a number of discriminatory statements. She does not allege that Gautreau engaged in any inappropriate touching or sexual advances.

Reine asserts that Gautreau was rude, offensive, and harsh. She cites a number of instances where he used inappropriate language and made overtly personal remarks about Reine's abilities and performance, though only a few of these made any reference to her sex. Reine was able to identify 15-20 instances of harassment in her three years on Gautreau's shift. Reine also introduced evidence that Gautreau treated other female employees and her African-American co-workers quite poorly. She provided deposition testimony that Gautreau displayed similarly demeaning behavior towards all of his subordinates, including several white males.

In approximately February 2005, Reine complained to management about Gautreau's actions. She met with Honeywell's Operations Manager, Plant Manager, and Human Resources Manager. The

company conducted an investigation. Gautreau admitted to making two of the statements. Honeywell required Gautreau to attend coaching sessions for his behavior. In July 2005, Reine was promoted and transferred away from Gautreau's supervision.

Reine further claims that Honeywell engaged in unlawful retaliation after she complained about Gautreau's behavior. She alleges that she was denied a bonus in late 2005, and that Gautreau failed to call her for overtime around the same period. Reine also asserts that she was denied promotions in March and October of 2005, as well as in mid-2006.

We review a grant of summary judgment *de novo*, applying the same standard as the district court. *Noble Energy, Inc. v. Bituminous Cas. Co.*, 529 F.3d 642, 645 (5th Cir. 2008). "In determining whether a genuine issue as to any material fact exists, [the court] must view the evidence in the light most favorable to the nonmoving party." *Fahim v. Marriott Hotel Servs., Inc.*, 551 F.3d 344, 348-49 (5th Cir. 2008).

Reine seeks relief under Title VII, arguing Gautreau's behavior created a "hostile work environment" at Honeywell. A hostile work environment claim arises in cases where harassment occurred, but no tangible adverse employment action was taken. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753-54 (1998). If an employee proves a hostile work environment claim against her immediate supervisor, the employer is subject to vicarious liability. *Id.* at 765.

A plaintiff who alleges a hostile work environment claim pursuant to Title VII must typically prove five elements: (1) she belongs to a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition or privilege of employment; and (5) the employer knew or should have known of the harassment and did not take prompt remedial action. *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 393 (5th Cir. 2007). Proof of the fifth element is not required where, as here, the purported harasser is a supervisor. *Id.* at 393 n.2.

The district court in this case concluded that Reine was unable to prove that Gautreau's treatment was "based on sex" as required by the third element.

The "critical issue" in determining whether workplace activities constitute harassment based on sex is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (citation omitted). "Title VII is not a shield against harsh treatment at the workplace; it protects only in instances of harshness disparately distributed." *Jackson v. City of Killeen*, 654 F.2d 1181, 1186 (5th Cir. 1981).

Reine's allegations easily prove that Gautreau was insulting and demeaning. More must be shown, though: did Gautreau's behavior evidence a specific discriminatory animus against Reine because of her

sex? Reine's evidence itself undercuts any inference of sex discrimination. Testimony from numerous employees – male and female – demonstrates that Gautreau was an "equal opportunity" harasser. When the conduct is equally harsh towards men and women, there is no hostile work environment based on sex. *See Butler v. Yselta Indep. Sch. Dist.*, 161 F.3d 263, 270-71 (5th Cir. 1998).

This high standard for judging hostility is specifically intended to prevent Title VII from becoming a "general civility code" for the workplace. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (citation omitted). Reine bore the burden to prove that Gautreau's behavior towards female employees was more severe than his treatment of males in the same position. *See Oncale*, 523 U.S. at 80. She has not done so.

Additionally, Reine alleges that Honeywell unlawfully retaliated against her following her discrimination complaint. In order to establish a prima facie case of retaliation, a plaintiff must show that: (1) she engaged in an activity protected by Title VII; (2) an adverse employment action occurred; and (3) a causal link exists between the protected activity and the adverse action. *McCoy v. City of Shreveport*, 492 F.3d 551, 556-57 (5th Cir. 2007). Assuming that the plaintiff makes such a showing, the burden shifts to the employer to articulate nondiscriminatory reasons for its employment action. *Id.* at 557. If the employer satisfies this burden, the plaintiff bears the ultimate responsibility to prove that the employer's proffered

reasons are a pretext for its true discriminatory motivation. *Id.*

The district court determined that even if Reine could prove that Honeywell engaged in adverse employment actions, she did not demonstrate a causal link between her discrimination complaint and the alleged adverse action, nor did she rebut Honeywell's non-retaliatory reasons for its behavior. Reine's retaliation claims stem from the denial of a single overtime opportunity and the denial of a discretionary bonus, both of which occurred approximately ten months after her complaint was filed. She also alleges that she subsequently did not receive three promotions in 2005 and 2006.

On summary judgment, Honeywell offered non-retaliatory reasons for each event. Honeywell introduced testimony that Gautreau followed proper company protocol when assigning overtime to a different employee on the date that Reine identified. Honeywell also showed that most employees at the plant did not receive the bonus that Reine claimed to have lost. In fact, the evidence showed that the board operator – the highest ranking employee on any given shift – received the discretionary bonus to the exclusion of all others.

As to the alleged failures to promote, the evidence demonstrated that Reine actually was promoted to backup board operator after the filing of her complaint. Concerning her applications for a further promotion, Honeywell offered uncontradicted testimony

that the decision-makers at the plant unanimously concluded that Reine was not yet qualified for the job.

A pretext is shown only if the adverse employment action would not have occurred "but for" the protected conduct. *Septimus v. Univ. of Houston*, 399 F.3d 601, 608 (5th Cir. 2005). Reine's subjective belief and conclusory allegations of retaliation are insufficient to demonstrate pretext. *Id.* Therefore, Reine has not met her initial burden to prove retaliation.

AFFIRMED.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

LAURIE ANCONA REINE	:	CIVIL ACTION
VERSUS	:	NO. 06-673
HONEYWELL INTERNATIONAL, INC.	:	CHIEF JUDGE RALPH E. TYSON
	:	DECEMBER 18, 2008

MOTION FOR SUMMARY JUDGMENT

APPEARANCES

FOR THE PLAINTIFF:

MR. J. ARTHUR SMITH, III, ESQ.

FOR THE DEFENDANT:

MR. THOMAS HARRY KIGGANS, ESQ.

REPORTED BY: JUDY Y. FRANCISCO, CCR

UNITED STATES COURTHOUSE
777 FLORIDA STREET
BATON ROUGE, LOUISIANA 70801
(225) 389-3566

* * *

[28] EGREGIOUS CASE HERE. AND I THINK WE ARE CERTAINLY ENTITLED TO TRIAL ON THIS CASE.

ONE HOUSEKEEPING MATTER, YOUR HONOR. WE HAD FILED A SUPPLEMENTAL MEMORANDUM THAT'S BEEN REFERRED TO. WE FILED IT BACK IN JULY. I NEVER RECEIVED AN ORDER PERMITTING THAT TO BE FILED. BUT I ASSUME IT IS PART OF THE RECORD, SO I JUST WANTED TO NOTE THAT FOR THE COURT. AND IF IT'S NECESSARY FOR THE COURT TO ENTER THAT ORDER, I CERTAINLY WOULD APPRECIATE THAT THAT BE DONE. WHAT WE ARE RESPONDING TO RAISED SOME NEW ISSUES.

THE COURT: ALL RIGHT.

MR. KIGGANS: YOUR HONOR, I DON'T HAVE ANYTHING FURTHER, UNLESS YOUR HONOR HAS SPECIFIC QUESTIONS.

THE COURT: I DON'T.

I HAVE BEEN SITTING HERE AND ASKING AND WAITING TO BE PERSUADED HOW THESE UNDISPUTED COMMENTS OF GAUTREAU CAN BE CHARACTERIZED AS GENDER BASED, AND I JUST DON'T SEE IT. I THINK THAT MR. KIGGANS MIGHT HAVE BEEN CORRECT. THE CLOSEST THAT YOU GOT WAS THE REFERENCE TO A MUSTACHE. BUT ALL THE REST OF THIS IS GENDER NEUTRAL. THE GUY IS OBVIOUSLY A JERK. BUT THE LAW DOESN'T – UNFORTUNATELY DOESN'T PROVIDE A CAUSE OF ACTION IF YOUR BOSS IS A JERK, OR YOUR SUPERVISOR IS A JERK.

PLAINTIFF HAS THE BURDEN OF ESTABLISHING THAT THE CONDUCT COMPLAINED OF WAS GENDER BASED, AND THAT IT WAS SUCH THAT IT [29] CREATED A HOSTILE ENVIRONMENT. AND THE COURT FINDS THAT THE UNDISPUTED FACTS OF THIS MATTER INDICATE THAT THE CONDUCT COMPLAINED OF DOES NOT RISE TO THE LEVEL OF GENDER BASED HARASSMENT, AND THAT THE PLAINTIFF THEREFORE CANNOT ESTABLISH THE ELEMENTS OF HER CLAIM REGARDING THE EXISTENCE OF A HOSTILE WORK ENVIRONMENT. EVEN IF THE COURT CONSIDERS THE ONE OR MORE OF THESE COMMENTS AS SOMEHOW GENDER RELATED, THAT IT IS NOT SUFFICIENT TO CHARACTERIZE THE WORK ENVIRONMENT AS SEVERE OR – CHARACTERIZE THE CONDUCT AT LEAST AS SEVERE OR PERVASIVE SUCH THAT THE WORK ENVIRONMENT WAS HOSTILE.

WITH REGARD TO THE RETALIATION CLAIM, THE COURT FINDS THAT THE DEFENDANT HAS PROVIDED SUFFICIENT NON-RETALIATORY LEGITIMATE AND SUFFICIENT NON-RETALIATORY REASONS FOR THE EMPLOYMENT ACTIONS THAT WERE COMPLAINED OF, EVEN IF ONE CONSIDERS THE DENIAL OF A PROMOTION IN THE FIRST INSTANCE, FOLLOWED BY A GRANT OF THE PROMOTION AT A LATER TIME, TO BE SOMEHOW RETALIATORY. I DON'T SEE THAT IT IS, BUT EVEN IF ONE

COULD LOGICALLY CHARACTERIZE IT AS SUCH, IT DOES NOT. THE DEFENDANT, AS I SAID, HAS PROVIDED SUFFICIENT AND LEGITIMATE NON-RETALIATORY REASONS FOR THE INITIAL DENIAL OF THE PROMOTION, NAMELY THAT THE PLAINTIFF WAS NOT QUALIFIED. AND THE DENIAL OF THE BONUS, IN THAT UNDER THE BONUS PLAN APPARENTLY IN EFFECT, THAT THE DEFENDANT'S COMPANY AT THAT TIME BONUSES WERE GRANTED BY SUPERVISORS WHO TRADITIONALLY GAVE THEM TO THE BOARD OPERATORS, AS OPPOSED TO THE EMPLOYEES [30] IN THE PLAINTIFF'S STATUS AT THE TIME.

SO FOR ALL THOSE REASONS, THE MOTION FOR SUMMARY JUDGMENT FILED BY THE DEFENDANT HONEYWELL INCORPORATED WILL BE GRANTED, AND JUDGMENT WILL BE ENTERED DISMISSING THE CLAIMS OF THE PLAINTIFF WITH PREJUDICE. THANK YOU ALL.

MR. KIGGANS: THANK YOU YOUR HONOR.

REPORTER'S NOTE: (END OF HEARING.)

CERTIFICATE

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF THE PROCEEDINGS IN THE ABOVE-ENTITLED NUMBERED MATTER.

/s/ Judy Francisco
JUDY Y. FRANCISCO, CCR
OFFICIAL COURT REPORTER

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-30030

LAURIE ANCONA REINE,
Plaintiff-Appellant

v.

HONEYWELL INTERNATIONAL INC,
Defendant-Appellee

Appeal from the United States District Court
for the Middle District of Louisiana, Baton Rouge

ON PETITION FOR REHEARING EN BANC

(Filed Feb. 25, 2010)

(Opinion 1/21/2010, 5 Cir., ___, ___, F.3d ___)

Before REAVLEY, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En

Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Leslie H. Southwick
United States Circuit Judge

Title 42, U.S.C. § 2000e-2. **Unlawful employment practices.**

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

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Title 42, U.S.C. § 2000e-2. **Impermissible consideration of race, color, religion, sex, or national origin in employment practices.**

(m) Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.